No. 30849 -- Shirley Hunt Braley v. Roger L. Hunt

Maynard, Justice dissenting:

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In her brief submitted to this Court on December 13, 2002, Ms. Braley admits that she and Mr. Hunt were divorced on May 12, 1989 and that "[t]he final order was silent on the issue of alimony." She also admits that "there was no record that a property settlement agreement was ever filed with the court." The plain and simple rule of law which was in effect at the time the parties divorced states, "Where a final divorce decree made no award of alimony, the divorce decree cannot be subsequently modified to grant alimony." Syllabus, *Savage v. Savage*, 157 W.Va. 537, 203 S.E.2d 151 (1974), *overruled by Banker v. Banker*, 196 W.Va. 535, 474 S.E.2d 465 (1996). In other words, neither party in this case was granted alimony in the original divorce decree; therefore, the family law master and the circuit court were without jurisdiction to later reconsider and award alimony to either party. Under this set of facts, that should be the end of the story. However, the majority determined that the law as it existed at that time does not apply. Consequently, that is not the end of the story.

It was not until 1996, seven years after these parties divorced, that this Court revisited the issue of alimony and said,

> Under W.Va.Code, 48-2-15(e) (1993), a circuit court has

> jurisdiction to hear and rule upon a motion seeking modification of a decree to include alimony, as the ends of justice may so require, even though the decree previously denied alimony or did not address the issue of alimony. To the extent that *Savage v. Savage*, 157 W.Va. 537, 203 S.E.2d 151 (1974), and its progeny are inconsistent, they are expressly overruled.

Syllabus Point 2, *Banker v. Banker*, 196 W.Va. 535, 474 S.E.2d 465 (1996). *Banker* also explicitly states that the new rule "is not to be applied retroactively."[1] *Id*., 196 W.Va. at 548, 474 S.E.2d at 478. Since the circuit court obviously lacked jurisdiction to reopen the issue of alimony for the benefit of either party, the majority avoids its own law and affirms the circuit court's award of alimony to Ms. Braley by stating that "nothing in *Savage* or *Banker* operated to prohibit a party from *voluntarily* assuming the legally enforceable obligation of paying spousal support, by agreeing to modify a prior divorce decree that was silent as to spousal support."

The uncontroverted fact is that Mr. Hunt did not enter into and sign an agreement with Ms. Braley. The circuit court found that Ms. Braley submitted a petition and

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[1]*Savage* was explained in *Banker*, 196 W.Va. at 543, 474 S.E.2d at 473, as follows,

> For more than thirty years, this Court has held that a party in a divorce proceeding could not reopen the issue of alimony except where the final order did in fact provide for at least a nominal alimony award. A one dollar award was deemed a sufficient nominal amount to continue the circuit court's jurisdiction to reopen the issue at a later time. Thus, in the absence of the nominal award of alimony, either a separate suit or a motion to reopen was barred by the doctrine of *res judicata* or lack of jurisdiction, respectively, after a final divorce was granted.

order in 1991 purportedly signed by both parties seeking a modification of alimony. Unlike the majority, I do not believe that a petition and order equal an agreement. But even if they do, the circuit court concluded in its order that Roger Hunt did not sign the petition or the order; his signatures were forged. The court nonetheless determined that since Mr. Hunt abided by the "apparent[] agreement," he was later estopped from denying that an agreement existed. In her response filed on appeal, Ms. Braley admits that "[t]he purported signatures of the petitioner on the petition . . . and on the agreed order. . . are not in the petitioner's handwriting." The fact is that no document exists that was signed by Mr. Hunt pursuant to which he agreed to pay alimony to Ms. Braley for life. I am appalled that any court in this State would make a life award to anyone based upon this set of facts.

> A short, fair review of the facts in this case shows:
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> ! No alimony was ordered when the final divorce order was entered.
>
> ! No property settlement agreement was ever signed by Mr. Hunt or filed with the court. Even the copy of the property settlement agreement which was supposedly signed by both Ms. Braley and Mr. Hunt in 1989, but admittedly was never filed, contains no provision for alimony.
>
> ! The signatures of Mr. Hunt that appear on the petition and court order are forged.
>
> ! There is no document signed by Mr. Hunt wherein he agreed to pay alimony. None!

In spite of these uncontroverted facts, and in spite of the further fact that someone perpetrated

a deliberate fraud on the trial court by submitting admittedly forged documents, this Court rewards that fraud by awarding alimony in the amount of $24,000 a year, for life! Furthermore, this Court ruled that Ms. Braley "may re-present [her request to modify and increase spousal support] to the lower court upon remand." She may get more.

To add insult to injury, this huge award is made without the majority uttering one word about the fraud on the court or about the forged court documents. Who forged these documents? Shouldn't there at least be some inquiry? Apparently it is now permissible to forge court orders with impunity. The last time I looked, forgery in this amount was a serious felony. I wonder how many people are serving time in our penitentiary today for forgery wherein the amount involved was much less than $24,000 a year. Try forging a check for $24,000 and see if the courts wink at that. Yet, this Court winks at a forged court order!

In sum, the facts do not support an award of alimony is this case, and, as outlined above, the law in existence when this divorce was granted prohibits alimony when not granted in the original decree. Nonetheless, based upon forged documents and the fact that Mr. Hunt gratuitously paid Ms. Braley $2,000 per month until May 1999, he must continue to pay at least that much as long as she lives.

Accordingly, I respectfully dissent from the majority opinion because, under

the facts and law presented here, I find no basis upon which to award alimony. I am authorized to state that Justice Davis joins me in this dissent.